

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY
10/26/2001

*** FILED ***
11/12/2001
CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2001-000093
Docket Code 512 Page 1
FILED: _____

STATE OF ARIZONA
v.
GUY E GARDNER

LYNN R AROUH

GUY E GARDNER
67 N FRASER DR W
MESA AZ 85203-0000

DISPOSITION CLERK-CCC
GILBERT CITY COURT
REMAND DESK CR-CCC
VICTIM WITNESS DIV-CA-CCC

MINUTE ENTRY

GILBERT CITY COURT
Cit. No. #00CR9181MI
Charge: ASSAULT

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since its assignment on October 16, 2001. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. The Court has received and considered Appellant's Memorandum, the file from the Gilbert City Court and the tape recording of Appellant's trial. No Memorandum has been received from Appellee.

Appellant, Guy Edd Gardner, was accused of committing the crime of Assault, a class 1 misdemeanor in violation of A.R.S. Section 13-1203(A)(1). The offense was alleged to have occurred on June 8, 2000, as amended¹ within the City of Gilbert, Arizona. The alleged victim was Appellant's ex-wife, Vallerie Gardner.

Appellant contends that the tape recording of his trial is incomplete; however, the tape does appear to be complete including the trial judge's finding of guilt.

¹ The date was amended prior to commencement of Appellant's trial.

Appellant complains about the procedures employed to serve the complaint upon him. However, Appellant alleges no prejudice, and this Court finds no error.

Appellant complains that the evidence presented was “inconclusive and false.” When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.² All evidence will be viewed in a light most favorable to sustaining a conviction and all reasonable inferences will be resolved against the Defendant.³ If conflicts in evidence exists, the appellate court must resolve such conflicts in favor of sustaining the verdict and against the Defendant.⁴ An appellate court shall afford great weight to the trial court’s assessment of witnesses’ credibility and should not reverse the trial court’s weighing of evidence absent clear error.⁵ When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.⁶ The Arizona Supreme Court has explained in *State v. Tison*⁷ that “substantial evidence” means:

More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.⁸

Appellant complains that the trial judge refused to hear the testimony of defense witness, Mr. Tryon. However, the trial judge made a determination that Mr. Tryon’s testimony was not relevant to the charges pending against Appellant. That relevancy ruling appears to be correct and predicated upon valid legal ground. It would have been improper for Appellant to impeach the testimony of Vallerie Gardner with her misdemeanor conviction, or contempt citation, in an unrelated proceeding which occurred an unknown time ago.

Though not raised by Appellant, upon reviewing the tape recording of this proceeding this Court noticed that the trial judge overruled Appellant’s objections to exhibits #1 and #4, photographs of bruises allegedly caused by Appellant to the victim. Appellant

² *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, cert.denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v. Industrial Commission*, 94 Ariz. 113, 382 P.2d 226 (1963).

³ *State v. Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert.denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

⁴ *State v. Guerra*, supra; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert.denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

⁵ In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P. 490 (1889).

⁶ *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; *State ex rel. Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).

⁷ Supra.

⁸ Id. At 553, 633 P.2d at 362.

objected to the admission of these exhibits because he had never seen the photographs before. He asked the judge and the prosecutor if the prosecution was not supposed to disclose those photographs before the trial. The prosecutor responded that Appellant had never ordered the photographs or requested them. The trial judge found that Appellant had waived his right to copies or to inspect the photographs by his failure to request them. This was error.

Appellant had no legal obligation to request to inspect or view evidence the State sought to introduce against him, unless the State had provided disclosure listing the photographs and other exhibits it intended to use at trial. Rule 15.1(a), Arizona Rules of Criminal Procedure, requires disclosure by the State no later than the pretrial conference or 20 days after arraignment, whichever is earlier, in limited jurisdiction courts. The State is required to disclose a list of all papers, documents, photographs or tangible objects which the prosecutor intends to use at trial.⁹ The trial court's file is before this court. Unfortunately, the trial court's file does not reflect disclosure by either party. Nor does the file reflect whether disclosure was addressed at a pretrial conference before the court. In the absence of anything in the record reflecting disclosure by the State as required by Rule 15.1(a), it was error for the trial judge to overrule Appellant's objections to photographs which had never been disclosed (either their substance or existence).

This Court's analysis is not complete without considering whether the error, substantial as it was, could be considered harmless error. The Arizona Supreme Court has previously defined fundamental error as an error that "reaches the foundation of the case or takes from the Defendant a right essential to his defense, or is an error of such dimensions that it cannot be said it is possible for a Defendant to have had a fair trial."¹⁰ And, "where there is substantial evidence in the record which will support the verdict and it can be said that the error did not contribute significantly to the verdict, beyond a reasonable doubt, reversal is not required."¹¹ The record in this case does not contain strong indicia of guilt from which this Court could conclude, beyond a reasonable doubt, that the trial court's error in allowing undisclosed photographs as evidence could not significantly have contributed to the judge's finding of guilt.

THEREFORE this Court will reverse and remand for a new trial.

For the reasons that this Court has concluded that a new trial is warranted,

IT IS ORDERED reversing the judgment of guilt and sentence of the Gilbert City Court and remanding this matter back to the Gilbert City Court for a new trial.

⁹ Rule 15.1(a)(4), Arizona Rules of Criminal Procedure.

¹⁰ *State v. King*, 158 Ariz. 419, 424, 763 P.2d, 239, 244 (1988).

¹¹ *State v. Gallegos*, 178 Ariz. 1, 11, 870 P.2d 1097, 1107, cert.denied, 115 S.Ct. 330, 513 U.S. 934, 130 L.Ed.2d 289, appeal after remand, 185 Ariz. 340, 916 P.2d 1056, cert.denied 117 S.Ct. 489, 519 U.S. 996, 136 L.Ed.2d 382 (1994), citing *State v. Thomas*, 130 Ariz. 432, 436, 636 P.2d 1214, 1218 (1981).